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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THOMAS PROULX et al., Individually and as Trustees, etc., Plaintiffs and Respondents, v. STEVEN MURRAY et al., Defendants and Appellants.	A099971 (San Mateo County Super. Ct. No. 400087)

The payors on a promissory note, Steven Murray, Don McPherson and Bay Glass Research, Inc. (hereafter defendants), appeal a judgment of $160,577.30 in favor of the payees, Thomas and Barbara Proulx, individually and as trustees of the Proulx Living Trust (hereafter collectively Proulx), entered on a motion to enforce a stipulated judgment. We reverse.

PROCEDURAL BACKGROUND

The stipulated judgment at issue forms part of a settlement agreement arising from a disputed $85,000 investment in defendants' business. On March 21, 1997, Proulx filed a complaint for breach of agreement for money due in the Superior Court of San Mateo County, which alleged that Proulx made a series of investments in the defendants' business totaling $85,000. Subsequently, the parties agreed that the payments would be considered a loan at an interest rate charged by major banks. The defendants, the complaint alleges, refused to pay the money due, plus interest. The defendants filed a cross-complaint alleging causes of action for negligent misrepresentation and fraud.

On March 15, 1999, the parties entered into a settlement, which was formalized with three documents: a settlement agreement, promissory note, and a stipulated judgment. We will turn first to the promissory note.

By the terms of the promissory note, defendants promised to pay Proulx the sum of $122,955.40, with interest at the rate of 10 percent, in monthly payments of varying amounts. Each payment was due on the 15th day of the month. The amount of the payments depended on the total gross revenue of Bay Glass Research, Inc., in the previous quarter. If the quarterly revenue was equal to $50,000, the monthly payment for the next calendar quarter would be $3,967.42. If the quarterly revenue exceeded this amount, the monthly payment would "be increased pro rata . . . to reflect the increase in gross revenues" but would not in any event exceed a maximum payment $5,000. If the quarterly revenue was less than $50,000, the monthly payment would be decreased pro rata down to a minimum payment of $2,277.85.

The promissory note contained an unusual and confusing default provision, which reads in full: "Any monthly payment set forth in Paragraph 2 received by Payee within 6 (six) days of the payment due date shall be deemed timely made. Payments received by Payee seven or more days after the payment due date shall incur a penalty of 5% of the payment amount, which penalty shall be added to the remaining principal balance on the Note. If a payment is not paid when due, and remains unpaid for at least 30 days after the due date, and if Payor actually receives written notice from Payee of such nonpayment within 25 days of the payment due date, the entire remaining principal amount under this Note together with all accrued and unpaid interest shall become immediately due and payable. Notice of nonpayment of an installment shall be effective when delivered to STEVEN MURRAY, DON McPHERSON AND BAY GLASS RESEARCH, INC. c/o Don McPherson, at 2547 – 8th Street, Berkeley, California 94710, or at such other address(es) as may in the future be provided to Payee in writing by registered mail. In the event Payor does not receive notice as set forth above, the remaining principal amount together with accrued interest shall become immediately due and payable if said payment is not received by Payee within 5 (five) days after receipt by Payor of notice of nonpayment."

The settlement agreement reiterated the payment and default provisions of the promissory note and added a provision for entry of a stipulated judgment in the event of default. Paragraph 4 required defendants "concurrent with execution of this Agreement [to] deliver to counsel for Proulx an executed Stipulation for Entry of Judgment in favor of Proulx in the amount of $122,955.40, . . . Paragraph 5 provided that, upon acceleration of the principal amount of the promissory note as the result of the defendants' default, "Proulx may move the Court for entry of Judgment based on the Stipulation for Entry of Judgment." Other provisions required the defendants to provide Proulx with quarterly financial statements and tax returns and called for parties to indemnify each other for costs, including attorney fees arising from breach of the agreement.

As required by the settlement agreement, Steven Murray and Don McPherson, on behalf of Bay Glass Research, Inc., executed a stipulation for entry of judgment, which consented to entry of judgment in favor of Proulx in the amount of $122,955.40, plus interest at the rate of 10% per annum.

On February 26, 2002, Proulx filed a motion "to enforce stipulated judgment and for judgment to be entered." The motion was noticed for hearing on March 26, 2003. In a declaration filed in support of the motion, Barbara Proulx stated that defendants defaulted in payment under the promissory note for three consecutive due dates: November 15, 2001, December 15, 2001, and January 15, 2002. In addition, they failed to provide required financial statements for any quarter in 2001. On January 31, 2002, she mailed a letter by registered mail to defendants giving notice of their non-payment.

The letter dated January 31, 2002, attached as an exhibit to the declaration, notified defendants that "[t]he amount due currently, including all past due interest and late fees, to bring you current is $8,005.68" and also informed them of their obligation under the settlement agreement to provide financial statements and tax returns. The letter concluded: “If these payments and associated late fees, as well as all financial statements and tax returns are not received within 5 days, the remaining principal amount together with accrued interest and late fees shall be immediately due and payable, . . . In addition, we will move the Court for entry of Judgment based on the Stipulation for Entry of Judgment.”

As the hearing date on the motion approached, defendants retained new counsel, Enoch Wang, who attempted unsuccessfully to obtain a continuance and then to file opposition papers. Wang secured from Proulx a stipulation for a continuance of the hearing on March 26, 2002, and attempted to file it the day before the hearing. He was orally informed by the clerk that the stipulation was rejected. At the commencement of the hearing, Wang informed the court that he was retained less than a week earlier and wished to file papers in opposition to the motion. The court replied that it was too late to file opposition.

In arguments on the motion, Wang maintained that Proulx was not entitled to accelerate payment on the promissory note or to file the stipulated judgment because defendants were not actually in default on the promissory note. He represented that the amount of monthly payments was linked to the earnings of the previous quarter. Since defendants made no profit in the last quarter of 2001, the amount due on January 15, 2002, amounted to the minimum payment of $2,275 “and change” (an obscure reference possibly referring to a late payment penalty). Defendants had in fact given Proulx checks for $2277 and $138 within 30 days after the January due date. Wang further represented that Proulx had not given defendants the required notice of nonpayment within 25 days of the due dates in November and December of 2001, and therefore Proulx could not rely on these missed payments to accelerate defendants’ obligation to pay principal and interest on the note. Finally, Wang informed the court that defendants had made $90,000 in payments of principal and interest and argued that the remaining balance on the promissory note was much less than the amount Proulx sought to recover in the stipulated judgment. Counsel for Proulx did not contest Wang’s factual representations.

Following the hearing, the court entered a minute order granting the motion to enforce the stipulated judgment and ordering judgment to be entered, together with costs and attorney fees. Defendants responded on April 8, 2002, by filing a motion for reconsideration of the minute order. In declarations of Enoch Wang and Don McPherson filed in support of the motion, defendants sought to document the representations that Wang made in open court at the hearing on March 26, 2002, and, in addition, provided more precise information regarding the payments they made following receipt of the notice of nonpayment dated January 31, 2002. Defendants gave Proulx two checks that were both deposited -- a check dated February 4, 2002, in the amount of $6,833.55 and a check dated February 14, 2002, in the amount $138.53. The sum of $6,833.55 represented three times the minimum payment of $2,277.85. The motion for reconsideration was set for hearing on May 6, 2002, and plaintiffs filed their opposition on May 1.

On May 1, 2002, the court entered judgment in favor of Proulx and against defendants in the amount of $160,577.30, which constituted the sum of the stipulated judgment of $122,955.40, plus interest of $36,198.90 and costs and attorney fees. The court denied defendants' motion for reconsideration in a minute order filed May 15, 2002, on the ground that the entry of judgment on May 1, "divested this court of jurisdiction on the motion for reconsideration." Following denial of the motion for reconsideration, defendants filed a motion to vacate judgment on May 23, 2002, which the court denied by an order filed July 23, 2002. Defendants then filed a timely notice of appeal from the judgment entered on May 1, 2002.

DISCUSSION

The appeal presents the threshold question of whether there was a default triggering the acceleration provisions of the promissory note. If there was no default and the absence of a default was shown at the hearing on March 26, 2002, we have no need to proceed to other assignments of error.

It is a familiar principle of appellate practice that the interpretation of a contract "is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.] Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; see also *San Mateo Community College Dist. v. Half Moon Bay Limited Partnership* (1998) 65 Cal.App.4th 401, 409.) Since the parties here have not relied on extrinsic evidence for interpretation of the promissory note and settlement agreement, we review the interpretation of these instruments de novo on appeal.

The confusing default provision of the promissory note and settlement agreement involves some perplexing problems of interpretation, but the third sentence is very precise in defining the conditions required for acceleration of the principal and interest payments. It provides that principal and accrued interest "shall become immediately due and payable" upon the occurrence of two conditions: (a) a payment "remains unpaid for at least 30 days after the due date" and (b) "Payor actually receives written notice from Payee of such nonpayment within 25 days of the payment due date." In the hearing on March 26, 2002, it was undisputed that defendants received Proulx's written notice of nonpayment dated January 31, 2002, more than 25 days after the November and December due dates but within 25 days of the January 15, 2002, due date. The notice thus was too late to predicate acceleration of the note on nonpayment on the November and December due dates but it was given in time to meet the conditions for acceleration with respect to the January due date. It was also undisputed that the defendants made the minimum payment within 30 days of the due date of January 15, 2002, thereby avoiding a default that would cause acceleration of the note pursuant to the terms of the third sentence.

Proulx argues that the last sentence of the default provision gave them an alternative right to accelerate defendants' obligation upon 5 days' notice of nonpayment. It is indeed difficult to understand the intended meaning of this sentence. The Proulx's interpretation, however, would deprive the third sentence of the default provision of any meaning or application. If the note may be accelerated at any time on five days' notice, the provision in the third sentence requiring notice within 25 days of nonpayment is effectively nullified.

The defendants construe the last sentence as dealing with the possibility that a timely sent notice would not be received by defendants within the 25-day period required by the third sentence. "In such cases," they argue, "the last sentence provides that, when [defendants do] receive the timely sent Proulx notice, [defendants have] five days to make the payment, or Proulx may accelerate the remaining balance due and unpaid interest for immediate payment . . . ." This interpretation gains plausibility from the use in the last sentence of the phrase "notice as set forth above," which appears to refer to notice given within 25 days of the due date, and from the use in the third sentence of the adverb "*actually*" to modify the verb "receives," which suggests the defendants were in fact concerned about the problems arising if the notice was not received in a timely manner after being mailed.

As Proulx recognizes, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) "[W]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Code Civ. Proc., § 1858; see also *Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, 880-881; *Loughrin v. Superior Court* (1993) 15 Cal.App.4th 1188, 1195-1196.) It follows that the court should, if possible, avoid an interpretation of particular language in a contract provision that would render other language "meaningless." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 828.)

We think defendants' interpretation of the last sentence best comports with these canons of contract interpretation. Faced with an interpretation that effectively nullifies the preceding language in the third sentence and an alternative interpretation that deals with a legitimate concern -- actual receipt of notice -- in a convoluted and confusing way, we find it most likely that the latter interpretation reflects the intent of the parties. As noted earlier, in the hearing on March 26, 2002, Proulx did not dispute the representation of defendants' counsel regarding payment of the amount due on January 15, 2002, within the prescribed 30-day period. Accordingly, the record of the hearing alone, without reference to the evidence of payment submitted in support of the post-judgment motions, establishes that there was no default triggering the acceleration provision of the note.

Code of Civil Procedure section 664.6 states that, upon motion to enforce a stipulated judgment, the court "*may* enter judgment pursuant to the terms of the settlement." "As this section reveals, a stipulated judgment is indeed a judgment; entry thereof is a judicial act that a court has discretion to perform. . . . [I]t may reject a stipulation that is contrary to public policy [citation], or one that incorporates an erroneous rule of law [citation]. 'While it is entirely proper for the court to accept stipulations of counsel that appear to have been made advisedly, and after due consideration of the facts, the court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter.' [Citation.]" (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664; cf. *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911.)

Our interpretation of the default provision of the promissory note and settlement agreement leads to the conclusion that the trial court abused its discretion in entering the stipulated judgment on May 1, 2002, because the record of the hearing on March 26, 2002, to enforce the stipulated judgment revealed that there was no default triggering the acceleration of principal and interest and the corresponding right to enforce the stipulated judgment. Since our holding calls for reversal of the judgment, we have no occasion to review other assignments of error and express no opinion on other disputed issues raised in the appeal.

The judgment is reversed. Costs are awarded to appellants.

Swager, J.

We concur:
Stein, Acting P. J.
Margulies, J.